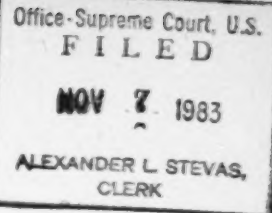


83-765



No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE DURHAM COUNTY BOARD
OF ALCOHOLIC CONTROL,
Petitioner

v.

NATHANIEL WELLS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Section 706(g), Title VII, of the Civil Rights Act of 1964 [42 U.S.C. §2000e-5(g)], is an employee previously denied promotion in violation of Title VII, who quits his job under circumstances not amounting to a constructive discharge, entitled to back pay for the period from the date he quit to the date of judgment, and to an order requiring his reinstatement?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and
Associate Justices of the Supreme Court
of the United States:

The Durham County Board of Alcoholic
Control, the petitioner herein, prays
that a writ of certiorari issue to review
the judgment of the United States Court
of Appeals for the Fourth Circuit entered
in the above-entitled case on August 8,
1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 714 F.2d 340, and is printed in Appendix A hereto. The memorandum opinion of the United States District Court for the Middle District of North Carolina is unreported, but is printed in Appendix B, hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves the last sentence of Section 706(g), Title VII, of the Civil Rights Act of 1964 [42 U.S.C. §2000e-5(g)] which provides:

No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or

promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of Section 704(a) [42 U.S.C. §2000e-3(a)].

STATEMENT OF THE CASE

Wells and another brought this action under Title VII and under 42 U.S.C. §1981, alleging racial discrimination in their employment with the Durham County Board of Alcoholic Control (hereafter "ABC Board".) The District Court had jurisdiction under 28 U.S.C. §1343.

Both employees alleged that they were unlawfully denied promotion from stock clerk to sales clerk in 1974. Wells additionally alleged that the ABC Board had refused to grant him light duty in 1975 after he developed a back malady in retaliation for his having filed EEOC charges,

forcing him to terminate his employment on September 22, 1975, and thereby constructively discharging him.

The case was tried simultaneously to a jury on the 42 U.S.C. §1981 claims, and to the Court on the Title VII claims. The jury found that the ABC Board had discriminated against neither employee in refusing promotion, and that Wells had not been constructively discharged in retaliation for having filed charges. The District Court reached a contrary result some four months later. It found that each employee had been denied promotion unlawfully under Title VII, and that Wells had been constructively discharged in retaliation for having filed EEOC charges. The District Court awarded the other plaintiff \$510.00 in back pay for the period August, 1974, when he was denied promotion, to January, 1975, when he was promoted. It awarded Wells \$22,256.80 in back pay from August,

1974, when he was denied promotion, to the date of judgment.

The ABC Board appealed from that part of the District Court's opinion and judgment that concluded that the ABC Board constructively discharged Wells in retaliation for, having filed EEOC discrimination charges, and awarded him backpay from September 22, 1975, when he quit his job, to the date of judgment.

The evidence at trial tended to show that Wells and his co-plaintiff had been employed as stock clerks in the liquor stores operated by the ABC Board. In the ABC stores, there are two positions other than manager and assistant manager: stock clerk and sales clerk. The stock clerk is responsible primarily for handling shipments of liquor from a central warehouse, putting a price tag on each bottle, and putting the bottles on the stock shelves. The sales, or "cash register"

clerk is responsible primarily for waiting on customers, and ringing up sales on the cash register. Because of the limited number of personnel on duty in a store at any one time, the two positions exchange functions freely: the stock clerk substitutes on the cash register for the sales clerk when the latter leaves to eat a meal, or run errands; the stock clerk takes over the sales clerk's duties when he is absent, or helps him when he falls behind. The formal job description for a sales clerk requires him to be able to perform, and to perform, the duties of stock clerk.

In August 1974, a sales clerk position opened in one of the ABC stores. The District Court found that both Wells and his co-plaintiff applied for the position, but the ABC Board's general manager determined that he did not have a suitable personality for dealing with the public, and declined to promote him. A second

sales clerk position opened in January, 1975, and Wells' co-plaintiff was promoted to fill it.

In September, 1974, Wells injured his back, but returned to work after being out a couple of weeks. He reinjured his back in June, 1975, and requested that the general manager give him a light duty assignment. The general manager told Wells that he had no light duty available to give him. In fact there were no light duty assignments available within the ABC stores, and no employee, white or black, had ever been placed on light duty, as Well's himself conceded in response to an EEOC inquiry. No sales clerk positions came open during the period from Wells' injury in June, 1975, through his termination of his employment with the ABC Board.

The ABC Board argued before the Court of Appeals that, upon the evidence, the District Court erred in finding that the Board had constructively discharged Wells in retaliation for having filed discrimination charges, and

that absent constructive discharge, the award of post-termination backpay and reinstatement were improper. The Court of Appeals held that the termination of Wells' employment bore no relevance to his entitlement to backpay during the post-employment period, and that he was entitled to recover backpay for the entire period after he was denied promotion. It affirmed the backpay award and the order of reinstatement.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI OUGHT TO BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE DECISION OF THE FOURTH CIRCUIT AND PRIOR DECISIONS OF THE FIFTH AND TENTH CIRCUITS.

The question is whether a district court may award post-termination backpay and order the reinstatement of an employee who was not discriminatorily discharged, as a remedy for pre-termination discrimination with respect to promotion.

The Fourth Circuit has answered the ques-

tion in the affirmative. The Fifth and Tenth Circuits answered the question in the negative, in Borque v. Powell Electrical Mftg. Co., 617 F.2d 61 (5th Cir., 1980), and in Muller v. United States Steel Corporation, 509 F.2d 923 (10th Cir., 1975). In Borque, the Fifth Circuit expressly rejected the argument of the Plaintiff that she was entitled to back pay for the entire period from denial of promotion to the date she obtained other employment, regardless whether she was constructively discharged or quit, 617 F.2d at 66, n.8. The Fourth Circuit's ruling in the present case can be squared neither with Borque, nor with Muller; in its opinion, the Fourth Circuit did not undertake to do so, notwithstanding that the ABC Board cited both cases in its brief, and relied upon them heavily in oral argument.

The decision of the Fourth Circuit presents more than a conflict between the Cir-

cuits. At issue as well is the construction to be placed upon the prohibition contained in 42 U.S.C. §2000e-5(g), which reads in pertinent part:

No order of the court shall require... the reinstatement...of an individual as an employee, or the payment to him of any back pay, if such individual... was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of Section 704(a) [42 U.S.C. §2000e-3(a)].

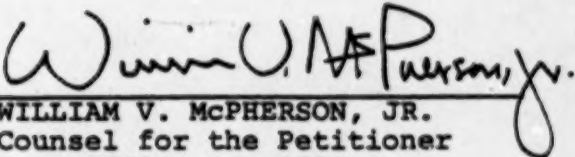
Although neither the Fifth nor the Tenth Circuits relied expressly upon this statute in Borque and in Muller, their decisions are consonant with the policy articulated therein; the opinion of the Fourth Circuit seemingly reads it out of the United States Code.

It is "the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination," Albemarle Paper Co. v. Moody, 422

U.S. 405, 419, 45 L.Ed.2d 280, 95 S.Ct. 2362 (1975). To say that Title VII has a broad remedial purpose, however, is not to say that its effect is to render an employer who has discriminated with respect to promotion or another condition of employment an insurer of its employee against whatever misfortunes of life might thereafter befall him, no matter how remote or tenuous the connection between the act of discrimination and the source of the employee's misfortune. Such seems to be the import of the Fourth Circuit's decision in the instant case. The Fifth and the Tenth Circuits have seen fit to limit the liability of employers to back pay for failure to promote to the period of employment, absent a retaliatory or discriminatory discharge. The Fourth Circuit has refused to impose such limitation. This Court ought to undertake to resolve the conflict.

CONCLUSION

Wherefore, petitioners respectfully
pray that a writ of certiorari be granted.


A handwritten signature in dark ink, reading "William V. McPherson, Jr.", is written over a horizontal line. The signature is cursive and stylized, with the first name "William" and the last name "McPherson" being more legible than the middle initial "V." and the suffix "Jr.".

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APPENDIX A

OPINION OF THE COURT OF APPEALS:

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATHANIEL WELLS, ET AL,
Appelles

v.

THE NORTH CAROLINA BOARD
OF ALCOHOLIC CONTROL, ET AL.,
Defendants

v.

THE DURHAM COUNTY BOARD
OF ALCOHOLIC CONTROL,
ET AL.,
Appellants

Argued March 11, 1983.
Decided August 8, 1983.

HAYNESWORTH, Senior Circuit Judge:

In this Title VII case (42 U.S.C.A. §2000e, et seq.), the district court found that the defendant, Durham County Board of Alcoholic Control (ABC), had violated the Act by failing to promote Nathaniel Wells to a position of "Sales Clerk" because of his race and in dis-

charging him in retaliation for his having filed complaints of racial discrimination with the EEOC. The court awarded Wells the difference in the pay scale for a Sales Clerk and a "Stock Clerk", the position Wells held from August 1974, when promotion was wrongfully denied, to September 1975 when he left his employment with ABC, plus back pay after that date. The defendant was also ordered to hire Wells for the next available Sales Clerk Position.

The ABC now concedes that discrimination was shown in the failure to promote Wells to a Sales Clerk position, but contests the finding that Wells was constructively terminated in retaliation for his complaints. It thus seeks to avoid the obligation to pay Wells back pay after termination of his employment in September 1975 and to reemploy him into

a Sales Clerk position.

We affirm the district court's judgment.

I.

The position of Stock Clerk requires bending and strenuous lifting to move cases of liquor. In contrast, Sales Clerks are primarily responsible for operating the cash register.

Wells had been a full time Stock Clerk at ABC since 1969. He was regarded as a good worker, and in June 1974, he requested consideration for promotion to the position of Sales Clerk. Notwithstanding that request, a few weeks later a white man, who had no previous experience working with ABC, was hired into a position of Sales Clerk. Denial of that promotion to Wells is now conceded to have been racially discriminatory.

In September 1974, Wells injured his

back. He returned to his job as Stock Clerk after a two-week absence, but he reinjured his back in June 1975. After having been out for some time, he returned to work but requested a light duty assignment. His physician wrote to Mr. Leathers, the ABC general manager, stating that continued heavy lifting threatened further injury to his patient's back. Nevertheless, equipped with a corset and a neck collar, Wells continued in his employment as a Stock Clerk. Wells required further treatment of his back in September 1975, and his physician again wrote to Leathers saying that Wells should not be required to lift more than ten to fifteen pounds. Leathers did nothing to relieve Wells of his heavy lifting duties, and finally responded to a request for lighter duty by advising Wells to "[t]ake a leave of absence or go

find yourself another job." Wells did not return to work after September 22, 1975.

II.

The defendant contends the award of back pay accruing after September 22, 1975 can be sustained only if its failure to give Wells light work duty constituted a constructive discharge in retaliation for having filed complaints of racial discrimination. Because it contends there was no evidence that it acted to make the job unattractive to Wells, Muller v. United States Steel Corp., 509 F.2d 486 (10th Cir. 1975), it concludes there was insufficient evidence of a constructive discharge.

We think the back pay award was proper whether or not Wells was constructively discharged. It is now undisputed that the defendant wrongfully refused to

promote Wells in August 1974 to a position of Sales Clerk. Had he not been wrongfully denied that promotion to relatively light work, it may reasonably be inferred that he would not have suffered an injury to his back or that any back problem would have been less severe. There was testimony indicating that the back injury was a result of strain from lifting, not of any degenerative or chronic disease. Wells reasonably ended his employment for reasons beyond his control, reasons which were causally linked to the defendant's wrongful denial of a promotion.

Indeed, the termination of his employment has no relevance to his entitlement to a back pay award during the post-employment period. It bears only upon the amount of the award. Wells was entitled to a back pay award from

the time he was wrongfully denied the promotion he sought, but he was under a duty to mitigate his losses. In light of the uncontradicted back problems that developed, the duty of mitigation did not require that he continue in the job of Stock Clerk with its heavy lifting duties.

Under these circumstances, we conclude that the award of back pay accruing after September 22, 1975 to the date of judgment and the order of reemployment in a position of Sales Clerk were proper.

The defendant correctly contends that the physician's letters were properly admitted only for the purpose of showing that the defendant had notice of the back injury and condition and not for the truth of the content of the letters. However, the plaintiff's own testimony adequately showed that his back condition hindered him in the performance of the

heavy duties as Stock Clerk and warranted his abandonment of that position when the defendant refused to promote or transfer him to light work.

III.

We have considered ABC's other contentions, and find them to be without merit. For the reasons set forth above relating to the award of back pay and reinstatement, and for the reasons set forth in the district court's opinion on the other issues, we affirm.

AFFIRMED.

APPENDIX B

MEMORANDUM OPINION OF THE DISTRICT COURT:

IN THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

No. C-77-197-D

NATHANIEL WELLS and JERRY
ALLEN,
Plaintiffs

v.

THE DURHAM COUNTY BOARD OF
ALCOHOLIC CONTROL, ET AL.,
Defendants

MEMORANDUM OPINION
[Entered August 9, 1982]

GORDON, Senior Judge:

This action, filed under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., concerns claims of racial discrimination against the Durham County Board of Alcoholic Control, the individual members of that Board, and the General Manager of that Board, W.A. Leathers.¹ Plaintiff

Nathaniel Wells alleges

¹Named also in the complaint as defendants were the North Carolina Board of Alcoholic Control and the individual members of that Board. In a Memorandum Opinion of this Court dated July 7, 1980, summary judgment was granted these defendants pursuant to Fed.R.Civ.P. 56(e).

discrimination in employment in the areas of promotion and job assignment and alleges further that the defendants made employment decisions unfavorable to him in retaliation for his having filed a complaint with the Equal Employment Opportunity Commission (EEOC). Plaintiff Jerry Allen alleges that he was denied promotion on account of his race.²

²This action was originally brought on behalf of a proposed class consisting of "all members of the Negro Race and other members of other minority races who are employed at the Alcoholic Beverage Control Stores of Durham County and throughout the State of North Carolina, who are applicants or are eli-

gible for promotion at the Alcoholic Beverage Control Stores of Durham County and throughout the State of North Carolina, who are applicants for or eligible for employment at the Alcoholic Beverage Control Stores of Durham County and throughout the State of North Carolina, who are prospective applicants for employment at the Alcoholic Beverage Control Stores of Durham County and throughout the State of North Carolina, and on behalf of all others similarly situated. (Complaint para. 4). The motion for certification of a class so described was withdrawn by the plaintiffs on November 21, 1978.

The relief sought is a declaratory judgment that the actions of the defendants have violated the rights of the plaintiffs under the statute cited above, an injunction prohibiting the defendants from further engaging in discriminatory activities and directing that the plaintiff Wells be given the next available sales clerk position with the Durham County Alcoholic Control Board. Plaintiffs also seek back pay.

A trial on the merits was held on

April 19-22, 1982. Based upon the testimony and the documentary evidence, the Court makes the following Findings of Fact and Conclusions of Law.³

³The complaint also alleged claims under 42 U.S.C. § 1981 and 42 U.S.C. § 1983. Plaintiff's counsel stated in open court that the § 1983 claim would not be pursued. The claim under § 1981 was presented to a jury who determined that the defendants had not violated any rights of the plaintiffs guaranteed by this statute. Plaintiffs have since moved for a judgment notwithstanding the verdict pursuant to Fed.R.Civ.P. 50(b) and for a new trial on the issue of damages pursuant to Fed.R.Civ.P. 59.

FINDINGS OF FACT

1. The defendant Durham County Board of Alcoholic Control (ABC Board) is an agency of Durham County and of the State of North Carolina. Its functions include the operation of retail stores for the sale of alcoholic beverages in Durham County, North Carolina. The individual defendants Lewis, Martin and

Dailey are, and have been since some time prior to 1974, members of the Board.

Board members are authorized to receive payment for their services pursuant to N.C.Gen.Stat. § 18B-700(g) (1981 Supp.)

The defendant Leathers is, and has been since some time prior to 1974, General Manager of the ABC Board.

2. During the years 1974 to 1976, inclusive, the ABC Board operated eight stores for the retail sale of alcoholic beverages, and, with minor fluctuations from time to time, employed thirty-seven persons in the stores.

3. At all times material to this cause, there have been four job classifications in the stores operated by the ABC Board: Manager, Assistant Manager, Sales Clerk and Porter. A porter, sometimes referred to as "Code Clerk" or "Stock Clerk" is required to unload

some 300 cases of whiskey a week from a truck, mark each bottle with the correct price and place each bottle on a shelf. Each case of whiskey weighs 40-50 pounds. A sales clerk operates the cash register and, in stores that are not self-service, brings bottles from the shelves in the back to the waiting customer. In the absence of a porter, or when not doing anything else, the sales clerk may have to perform the duties of a porter. The sales clerk position is far less strenuous than that of the porter.⁴

⁴Defendant's Exhibit # 43 contains job descriptions of the various job classifications in the ABC system. Defendants contend that the job descriptions were in effect from 1972 to 1974. The paper is not dated. The defendant Leathers prepared the written job description, but testified that he did not recall when he did so. The only testimony that would indicate that the written job description was not prepared in response to the filing of the EEOC complaints by the plaintiffs was that of Leathers. It is uncontroverted that

the written job descriptions were never posted where employees had access to them. The Court does not find Exhibit # 43 to be dispositive of the actual job requirements.

4. Porter is the lowest paying, most physically strenuous job in the ABC system.

5. Every black ever hired to work in a store run by the ABC Board was hired into the porter position. (Plaintiffs' Exhibit # 47).

6. All but two of the whites hired to work in the stores operated by the ABC Board were hired into the position of sales clerk, a higher paying position than that of porter. (Plaintiffs' Exhibit # 47).

7. From February 1, 1969, to September, 1975, the ABC Board permitted blacks to attain the position of sales clerk only through promotion. (Plaintiffs' Exhibit # 47).

8. From February 1, 1969, to September, 1975, the ABC Board hired eleven whites directly into the position of sales clerk, who had no prior experience working in the ABC system. These whites were hired directly into sales clerk vacancies instead of promoting qualified blacks, despite the greater experience of these blacks in the ABC system. (Plaintiffs' Exhibit # 47).

9. The ABC Board does not follow a policy of posting job vacancies. Employees can find out about job vacancies only through word of mouth. One employee found out that the store at which he worked was going to be closed from a customer.

10. The ABC system has no seniority system. Employees are promoted in accordance with the subjective evaluations of the General Manager of the ABC

Board, the defendant Leathers. The principal qualification considered by Leathers for the position of sales clerk is the person's attitude and personality.

11. When asked to explain the discrepancies between blacks and whites in initial job assignments, Leathers stated that whites were only interested in the higher paying position of sales clerk while blacks would "take anything".

12. Tyler Pendergraph, a white employee, was hired into a sales clerk position on May 16, 1974. Pendergraph did not specify "sales clerk" on his application for employment. Richard Holloway, a white employee, was hired into a sales clerk position on April 12, 1973. Holloway did not specify "sales clerk" on his application. Willie Torain, a black employee, was hired into

a position as a porter on March 11, 1968. Torain specified "sales clerk" on his application.

13. The ABC Board, between the dates of February 1, 1969, and September 22, 1975, engaged in a pattern and practice of racial discrimination against blacks whereby all blacks hired into stores operated by the Board had to begin in the lowest level position of porter, while whites were directly employed, without prior experience in the ABC system, into the position of sales clerk, even where blacks already employed as porters were qualified, experienced, and desirous of obtaining sales clerk positions as they came open.

JERRY ALLEN

14. The plaintiff Allen, a black, was employed as a full-time porter by the ABC Board on December 13, 1971.

15. In June of 1974, after a white with no prior experience in the ABC system was hired directly into a position as sales clerk, Allen asked Leathers "what a person has to do to get a promotion around here". This conversation was overheard by A.J. Wilson, another ABC employee. At trial, Leathers testified that he did not recall the conversation. It is concluded that the conversation took place.

16. A request for promotion within the ABC system will be heard in any form. (Defendants' Answers to Plaintiffs' First Set of Interrogatories # 6(1), filed December 28, 1977).

17. Jerry Allen applied for promotion to sales clerk in June of 1974.

18. Allen was by all accounts an excellent employee. In addition, during the summer of 1973, Allen operated the

cash register for three months while he was employed in the position of porter.

19. Allen was qualified for the position of sales clerk in June of 1974.

20. In July of 1974, a sales clerk position opened in one of the stores. The defendant Leathers hired W.R. Porter, a white, for the position on August 1, 1974. Porter had no prior experience in the ABC system.

21. On August 5, 1974, Leathers received notice that Allen had filed a complaint with the Durham Human Relations Commission on July 24, 1974. The complaint alleged that Allen had been the victim of racial discrimination in the area of promotions.⁵ (Plaintiffs' Exhibit # 27).

⁵The Durham Human Relations Commission was authorized in November of 1970 by the City Council of Durham to receive and investigate claims of discrimination

in the areas of housing, education and employment. The Commission has no subpoena power.

22. On September 16, 1974, the ABC Board refused to make a roster including the name, race, position, length of service, job location, and salary of the thirty-seven store employees available to the Durham Human Relations Commission. (Plaintiffs' Exhibit # 5 & # 6). This information was readily available to the ABC Board. (Plaintiffs' Exhibit #47).

23. In November of 1974, the Durham Human Relations Commission, after an investigation of the charges against the ABC Board, concluded that Allen's charges of racial discrimination in the area of promotions were substantiated. (Plaintiffs' Exhibit # 7). This conclusion was communicated to the members of the ABC Board.

24. Allen filed a complaint with the Equal Employment Opportunity Commission charging discrimination in the area of promotions. Notice of the charge was given to the ABC Board on November 14, 1974. (Plaintiffs' Exhibit # 34).

25. Allen was promoted to sales clerk on January 16, 1975.

26. Allen was denied promotion to sales clerk in August of 1974 on account of his race.

NATHANIEL WELLS

27. The plaintiff Wells, a black, was employed as a full-time porter with the ABC Board on February 1, 1969.

28. Prior to June of 1974, Wells expressed no interest in becoming a sales clerk. Wells stated to others that he did not care to deal with the public. In June of 1974, Wells changed his mind and decided that he did want

to work the cash register.

29. On May 16, 1974, Tyler Pendergraph, a white with no prior experience in the ABC system, was hired into a position as sales clerk. (Plaintiffs' Exhibit # 47).

30. In June of 1974, Wells asked Leathers for a promotion to sales clerk.

31. On July 24, 1974, Wells filed a complaint with the Durham Human Relations Commission stating that he was denied the opportunity to be considered for vacancies. (Plaintiffs' Exhibit # 1).

32. On August 1, 1974, the defendant hired a white, W.R. Porter, into a position as sales clerk. Porter had no prior experience in the ABC system.

33. On August 6, 1974, Charles Lewis, Chairman of the ABC Board, acknowledged receipt of a letter from

the Durham Human Relations Commission informing the Board of the complaint that had been filed against it. (Plaintiffs' Exhibit # 4).

34. On September 4, 1974, Wells injured his back picking up a case of whiskey. Wells missed twenty-two days with the injury. His absences were made known to Leathers. (Plaintiffs' Exhibit # 23). Wells asked to operate a cash register as a sales clerk, a job that required considerably less lifting. Leathers refused the request. Leathers stated at trial that he could not allow someone with that bad a back to operate the cash register.

35. In October of 1974, Leathers allowed Wells to return to the more strenuous job of porter.

36. Wells was considered by some to be the best porter in the ABC system.

Wells had, as of the time that he applied for a position as a sales clerk, operated the cash register when other sales clerks were on break or when the manager of the store left to go to the bank.

37. At trial, the defendant Leathers testified that Wells was not qualified to be a sales clerk due to his personality. Leathers testified that Wells was sullen, morose and unresponsive. Leathers testified that the primary requirement for the position of sales clerk was that the person have a pleasing personality that would enable him to deal with the public.

Leathers and one other witness testified that Wells' personality rendered him unqualified to be a sales clerk. Other witnesses stated that Wells' personality was no more disagreeable than many of the sales clerks. Looking to more objective means of proof, the defen-

dants were only able to point to one instance in Wells' eight year career with the ABC system that he had a disagreement with anyone. That instance resulted in no disciplinary action against Wells. In addition, the defendants had no record of Wells' ever having been involved in a disagreement with a customer.

The Court concludes that Wells was qualified to be a sales clerk when he applied for that position in June of 1974.

38. Wells was denied promotion to sales clerk in August of 1974 due to his race.

39. On October 16, 1974, Wells and Allen filed complaints with the EEOC alleging discrimination in the area of promotion. Notice of the charges was given to Leathers who discussed the

charges with the members of the ABC Board.

40. In June of 1975, Wells reinjured his back and was seen at the Duke University Medical Center. His physician, Dr. Kenneth S. McCarty, wrote Leathers stating that he had diagnosed Wells as having "femoral triangle strain without herniation", and recommending that Wells be employed in an area in which he would not be required to do extensive heavy lifting, as a risk of herniation of the disc existed. (Plaintiffs' Exhibit # 24). During the time from June 12 to September 15, 1975, Wells missed twenty-nine working days due to his back problems.

41. On September 18, 1975, Dr. Donald S. Bright wrote Leathers stating that Wells had a chronic interspinous ligament strain of his lumbar spine and

recommending that Wells not be required to lift more than ten to fifteen pounds or stoop or bend for prolonged periods.

(Plaintiffs' Exhibit # 25).

42. Leathers received another letter dated September 22, 1975, written by Dr. Bright which noted that Wells was still doing heavy lifting and stated that Wells showed signs of pressure on the nerve roots in his back. Dr. Bright stressed the importance of Wells' avoidance of heavy lifting.

(Plaintiffs' Exhibit # 26).

43. On September 22, 1975, the plaintiff Wells ceased work for the ABC Board. He accrued sick leave and vacation until exhausted on or about October 22, 1975. Wells then filed an application with the ABC Board's insurance company to receive permanent disability benefits. Wells received disability checks beginning in December of 1975 and continuing for two years.

44. It is concluded that Wells left

employment with the ABC Board as a result of his inability to do the heavy lifting required of a porter and as a result of the fact that he was refused the opportunity to become a sales clerk.

45. On October 27, 1975, Leathers hired Lannie Reardon, a white with no prior experience in the ABC system, as a combination sales clerk and porter. (Plaintiffs' Exhibit # 47). Reardon worked for one month as a porter before going to work on the cash register.

46. The defendant Leathers testified that he did not assign Wells to the position of sales clerk because the position was not a "light duty" position and Wells would still be required to lift cases of whiskey during those times that he was not busy at the register. There was testimony from other witnesses to the effect that the sales clerk position was less strenuous than that of the porter simply because the sales

clerk spent most of his time at the register and only helped with the lifting in the absence of a porter or when not doing anything else.

In addition, it is clear that Leathers gave certain white employees with disabilities far worse than Wells' the opportunity to work as sales clerks. Frank Beard, a white man, worked as a sales clerk despite the fact that he had a deformed hand. A fellow worker of Beard's testified that Beard could not lift the 40-50 pound cases of whiskey, but rather lifted the bottles one at a time. Martin Mangum, a white man, had been a manager in the ABC system. Mangum had major back problems that required removal of a disc and eventually a spinal fusion. Before he had recovered from this surgery, he was in an automobile accident and required a second spinal fusion. (Plaintiffs' Exhibit # 52). Leathers was aware of Mangum's back pro-

blems but gave Mangum at least the opportunity to try to work as a sales clerk.

It is concluded that the ABC Board tacitly allowed certain employees in stores under its control to avoid heavy lifting. It is further concluded that the plaintiff Wells was not allowed to avoid heavy lifting due to the fact that he is black and due to the fact that he was challenging the employment practices of the ABC Board.

47. The refusal of the ABC Board to allow the plaintiff Wells to avoid heavy lifting forced Wells to leave the ABC system on September 22, 1975.

48. In October of 1975, Wells was certified as totally disabled. From October of 1975 until October of 1977, Wells received 60 per cent of his base pay in the form of disability benefits.

49. During the period of January of 1978 until August of 1978, Wells was not employed and did not make any effort to find work.

50. The actual earnings of Wells in the years 1978 through 1981, inclusive, are reflected in Plaintiffs' Exhibits 80-83.

DISCUSSION

Jerry Allen's claim requires little analysis. He can establish a prima facie case merely by showing (1) that there was a vacancy (2) for which he, a black, was qualified, but that (3) he was rejected and (4) that the job remained open or a white was given the job. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1972); Ambush v. Montgomery County Government Department of Finance Division of Revenue, 22 FEP Cases 1101, 1104 (4th Cir. 1980).

The defendants based their entire defense at trial on their allegation that Leathers, the General Manager of the ABC Board, was not aware of the fact that Allen was interested in a position as a sales clerk. Leathers testified that he was not aware that Allen wanted the higher paying, less

strenuous job until he had received notice that Allen had filed a charge of racial discrimination with the Durham Human Relations Commission. Proof at trial requires a different conclusion.

Allen testified that he had been aware that whites with no prior experience in the ABC system were being hired directly into positions as sales clerks. Allen testified that after a white with no prior experience was hired into a position as a sales clerk in June of 1974, he confronted Leathers about the situation, and asked him what a person had to do to get promoted. Allen's testimony was corroborated by A.J. Wilson who testified that he overheard that part of the conversation. Leathers testified that the conversation did not take place "to his knowledge". The Court must conclude that the conversation took place and that Allen applied for a position as sales clerk in June of 1974.

The defendants did not seriously contend that Allen was not qualified for the position of sales clerk. Allen had displayed excellent work habits in the almost three years that he had been with the ABC system. In addition, he had worked the cash register for three months the previous summer. There is no doubt, however, that Allen was rejected for the job, and that the job was given to a white man with no prior experience in the ABC system on August 1, 1974.

It is, therefore, concluded that Allen has established a prima facie case of racial discrimination under the McDonnell Douglas analysis. The establishment of the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1980), citing Furnco Construction

Corp. v. Waters, 438 U.S. 567, 577 (1978).

Accordingly, the defendants must present evidence sufficient to raise a genuine issue of fact as to whether they discriminated against Allen. Id., at 254. To accomplish this the ABC Board must set forth the reasons for not promoting Mr. Allen. Id., at 255. The ABC Board did not attempt to articulate any reasons for not promoting Allen beyond its claim that it was not aware of the fact that he was interested in the position. The Court does not credit this claim. Allen applied for the position in accordance with ABC requirements and a white man was given the job some weeks later. Allen has convinced the Court that he has been the victim of intentional discrimination by the ABC Board in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(1).

NATHANIEL WELLS: FAILURE TO PROMOTE

It is correct to consider Wells' claim (as well as Allen's) within the context of the general practice of discrimination that existed with regard to promotion and initial job assignments in the ABC system from 1969 to 1975. Teamsters v. United States, 431 U.S. 324, 359 (1976); Brown v. Gaston County Dying Machine Company, 457 F.2d 1377, 1382 (4th Cir. 1972), cert. den., 909 U.S. 982 (1972); Sumler v. City of Winston-Salem, 448 F.Supp. 519, 527 (M.D.N.C. 1978).⁶ Between the years 1969 and 1975,

⁶In fact, the almost perfect disparity between the treatment of blacks and whites in initial job assignments prior to the filing of the EEOC complaints makes it reasonable to infer that the unfavorable employment decisions concerning Allen were made pursuant to the discriminatory policy. Allen has established a prima facie case in this manner. Teamsters, 431 U.S. at 359.

eleven whites were hired directly into positions as sales clerks. Two whites were hired as porters but one of the two was

allowed to work at the cash register within a month of starting with the system. Of the six blacks hired during this time, all had to start at the porter position. The ABC Board, understandably, did not argue that this disparity came about by chance.

The defense asserted by the ABC Board (that Wells is not qualified to be a sales clerk) however, is best considered by using the four-element McDonnell Douglas test. 411 U.S. at 802. It is uncontroverted that W.R. Porter, a white, was allowed to fill a vacant sales clerk position that Wells had applied for. Therefore, Wells must only establish that he was qualified for the job. Defendants assert that the job was denied Wells because his personality precluded contact with the public. A "suitable personality" is, of course, the most subjective of all qualifications.⁷

⁷ Defendants have not attempted to arti-

culate objective standards such as education, experience, length of service, reliability or aptitude to account for the preferential treatment afforded whites in initial job assignment and promotion. See generally, Brown, 457 F.2d at 1383. Whether or not subjectivity is necessary in this hiring situation, subjective judgments are suspect as job qualifications when exercised by members of an all-white staff. Phillips v. Joint Legislative Com., Etc., 637 F.2d 1014, 1026 N. 21 (5th Cir. 1981). In the presence of the unexplained disparity between blacks and whites in initial job assignments, the use of subjective criteria by the ABC Board is illegal. Young v. Edgecomb Steel Company, 363 F.Supp. 961, 970 (M.D.N.C. 1973), (aff'd. in part and reversed in part on other grounds) 499 F.2d 97 (4th Cir. 1974).

In addition, the evaluation of Wells' personality was made by the defendant Leathers, a man who had never hired a black into the position of sales clerk and had allowed blacks to attain that position only through promotion. Finally, it is uncontroverted that Leathers never posted any notice of job vacancies nor what the qualifications for those vacancies were.⁸

⁸ Failure of an employer to post notice of job vacancies has been consistently condemned by the courts as tending to maintain

an all-white work force. Barnett v. W.T. Grant Co., 518 F.2d 543, 594 (4th Cir. 1975); Rock v. Norfolk & Western Ry., 473 F. 2d 1344, 1347 (4th Cir. 1973).

Looking to the totality of the evidence; the fact that blacks had been forced to start in the porter position while whites had been allowed to start in the higher paying position of sales clerk, the fact that there was no disciplinary file on Wells reflecting that he had trouble dealing with customers, the fact that Wells had actually operated the cash register and dealt with customers, the Court must conclude that Wells was qualified by way of his temperament for the position of sales clerk when he applied for the position in June of 1974, and must conclude further that Wells has established a prima facie case of racial discrimination. Accordingly, defendants must now rebutt the inference of discrimination that Wells' showing gives rise to. Burdine, 450 U.S. 254. The defendants may

do so by presenting evidence that Wells was rejected for a valid, nondiscriminatory reason. Id.

The ABC Board contends that Wells was not allowed to work the cash register because of his back troubles. A requirement for the job of sales clerk, according to the ABC Board, is that the person be able to perform the duties of a porter in case there is no porter at the store or in case the porter needs help. At the outset, the Court is suspicious of this explanation. Wells was performing the job of porter at the time that he applied for the position. He did not injure his back until some time after the job was given to a white man in August of 1974. The ABC Board asserts as a reason for not promoting Wells in August of 1974, a condition that did not arise until September of 1974. Nevertheless, the requirement that an employee have the physical ability to perform the job in question

is reasonable and it can be said that the ABC Board has raised a genuine issue of fact as to whether it discriminated against Wells. Burdine, 450 U.S. 254. The plaintiff Wells must now demonstrate that the proffered reason for the ABC Board's decision not to promote him is a pretext to cover a discriminatory act. Id., at 256.

Wells has called the Court's attention to the circumstances surrounding the employment of two white sales clerks in the ABC system. One of the whites had a deformed hand that kept him from lifting cases of whiskey. The other had a back condition seemingly much more serious than that of the plaintiff Wells. Both of these men were allowed, with at least the tacit approval of the ABC Board, to avoid heavy lifting. The Court must, therefore, conclude that there is no mandatory requirement that all sales clerks be able to perform the heavy lifting required of a porter.

It is concluded that the reason proffered was a pretext.

Upon review of all of the evidence concerning the employment relationship between Wells and the ABC Board, the Court concludes that it is more likely than not that the decision not to promote Wells in August of 1974 was based, at least in part, on consideration of Wells' race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(1).

DISCRIMINATORY DISCHARGE

After Wells was denied promotion to sales clerk in August, 1974, he filed a complaint with the EEOC. The ABC Board had knowledge of this fact. Wells now contends that the ABC Board considered this fact in their decision to continue denial of promotion to Wells. Wells contends further that his back injury made denial of the sales clerk position fatal to his continued employment with the ABC system. Such

denial, according to Wells, is in violation of 42 U.S.C. § 2000e-3(a) as being made in retaliation for Wells' having filed the EEOC charge.

A constructive discharge exists when the employer deliberately renders the employee's working conditions intolerable and thus forces him to quit his job. Muller v. United States Steel Corporation, 509 F.2d 923 (5th Cir. 1975), citing J.P. Stevens & Co., Inc. v. NLRB, 461 F.2d 490 (4th Cir. 1972). Looking to the letters written to the ABC Board by Wells' doctors, it is clear that Wells had a serious back problem. This fact was not contested by the defendants at trial. There is no doubt that the ABC Board knew of Wells' injury. There is also no doubt that the white who ultimately replaced Wells was placed at the cash register after only a month as porter. Therefore, the ABC Board cannot seriously contend that there was no need for another

sales clerk at the time that they denied the position to Wells. For this reason, the Court concludes that the decision to keep Wells in the porter position was not motivated by business necessity and was done "deliberately" within the meaning of Muller, supra. The inquiry remains as to whether the decision was motivated by consideration of the fact that Wells had challenged the employment policies of the ABC Board by filing the EEOC complaint.

A worker bringing a Title VII action for retaliation can establish a prima facie case by showing (a) he was engaged in opposition to action made unlawful by that title; (b) the form of the plaintiff's opposition is protected; (c) the charging party has been subjected to adverse treatment by the defendant; and (d) the adverse treatment occurred because of the plaintiff's opposition. Bradington v. International Business Machines Corp., 360 F.Supp. 845 (D.C.Md.1973),

aff'd 492 F.2d 1240 (4th Cir. 1974).

As demonstrated above, the promotion policy of the ABC Board is illegal. Wells had only filed complaints with the EEOC and the Durham Human Relations Commission by way of opposing the promotion policy. Obviously, this is not illegal. The refusal of the ABC Board to allow Wells to have the lighter duty sales clerk job ultimately forced him to leave the ABC system. Thus, he was treated adversely by the ABC Board. As to the final element of the prima facie case, it is concluded that the continued denial of promotion even after several letters from Wells' doctors to the ABC Board, was more likely than not, motivated by the fact that Wells had challenged the promotion policy of the ABC Board. In reaching this conclusion, the Court looks to the totality of the evidence. The defendant's arguments to the effect that Wells was not qualified and that there was no light duty in the ABC system

offered in rebuttal have been considered and rejected supra.

CONCLUSIONS OF LAW

1. The Durham County ABC Board is an employer as that term is defined by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(b).

2. The plaintiffs are, or were at times relevant to this lawsuit, employees of the Durham County ABC system as that term is defined by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(f).

3. The Durham County ABC Board violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e2(a)(1), by failing to promote each of the plaintiffs into the position of sales clerk, for which each plaintiff was qualified.

4. The Durham County ABC Board violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e3(a) by dis-

charging the plaintiff Wells in retaliation for his having filed complaints of racial discrimination against the Durham County ABC Board with the Durham Human Relations Commission and the EEOC.

5. The plaintiff Allen is, therefore, entitled to receive the pay differential between what was being paid to a sales clerk and what he made as a porter from the time that he was denied the sales clerk position in August of 1974 after he had applied for the position in June of 1974 until he was actually promoted in January of 1975.

6. The plaintiff Wells is entitled to receive the pay differential between what he made as a porter and what was paid sales clerks from the time that he was denied the position in August of 1974 until he was discharged in September of 1975. In addition, he is entitled to receive what he would have made in the position of sales

clerk from the time that he was discharged in 1975 until the date of entry of this judgment offset by earnings received through other gainful employment, by the amount that he received in the form of disability benefits and minus the losses he could have avoided through a reasonable effort to mitigate damages by finding other work.

7. Plaintiff Wells is also entitled, as an additional remedy, to an injunction requiring the ABC Board to rehire him as a sales clerk upon the next available sales clerk vacancy in the Durham County ABC system.

8. The ABC Board will be enjoined to post in conspicuous places in all ABC stores in Durham County notice of all vacancies in any position in the Durham County ABC system for two weeks before filling the job.

Barnett v. W.T. Grant Co., 518 F.2d 543
(4th Cir. 1975).

9. The ABC Board will be enjoined to articulate objective criteria that will be considered in determining job assignments and promotions in the Durham County ABC system. Young v. Edgecomb Steel Company, 363 F.Supp. 961 (M.D.N.C. 1973), (aff'd. in part and reversed in part on other grounds) 499 F.2d 97 (4th Cir. 1974). These job criteria will be posted in conspicuous places in each store in the Durham County ABC system.

10. Both plaintiffs are entitled to a permanent injunction enjoining the defendants, their successors, and all persons acting in concert with them, from in any way in the future discriminating against either plaintiff in job opportunities in the Durham County ABC system.

/s/ Eugene A. Gordon
United States District Judge

August 9, 1982

APPENDIX C

JUDGMENT OF THE COURT OF APPEALS:

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATHANIEL WELLS, ET AL,
Appellees

v.

THE NORTH CAROLINA BOARD
OF ALCOHOLIC CONTROL, ET AL.,
Defendants

v.

THE DURHAM COUNTY BOARD
OF ALCOHOLIC CONTROL,
ET AL.,
Appellants

JUDGMENT
[Entered August 8, 1983]

Appeal from the United States District
Court for the Middle District of North
Carolina.

This cause came on to be heard on the
record from the United States District Court
for the Middle District of North Carolina,
and was argued by counsel.

On consideration whereof, It is now here
ordered and adjudged by this Court that the

judgment of the said District Court
appealed from, in this cause, be, and the
same is hereby, affirmed.

/s/ William K. Slate, II
CLERK

CERTIFICATE OF SERVICE

I, William V. McPherson, Jr., a member of the Bar of the Supreme Court of the United States and counsel of Record for the Durham County Board of Alcoholic Control, Petitioner herein, hereby certify that on November 4, 1983, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

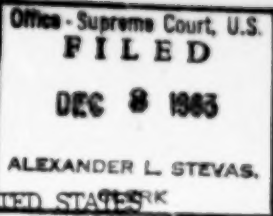
On Nathaniel Wells, Respondent herein, by depositing such copies in the United States Post Office, Richmond, Virginia, with First Class postage prepaid, properly addressed to the post office address of Thomas F. Loflin, III, Esquire, the above-named Respondent's counsel of record, at Loflin & Loflin, Post Office Box 1315, Durham, North Carolina 27702.

All parties required to be served have
been served.

Dated November 4, 1983.

William V. McPherson, Jr.

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No. 83-765

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE DURHAM COUNTY BOARD
OF ALCOHOLIC CONTROL
Petitioner,

v.

NATHANIEL WELLS,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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No. 83-765

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE DURHAM COUNTY BOARD
OF ALCOHOLIC CONTROL
Petitioner,

v.

NATHANIEL WELLS,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN REPLY TO PETITION
FOR WRIT OF CERTIORARI

I. There Is No Conflict Among the Circuits.

The actual question presented, consistent with the facts, is as follows:

Where the trial court found as facts that Respondent employee was not promoted to a higher-paying, lighter-duty job because of his race and in retaliation for his having filed charges with the EEOC, and with the knowledge by Petitioner employer that employee's back injury prevented his continuing employment without such promotion,

did the courts below properly award such employee back pay from time employee was forced to leave employment until time of trial?

The Fourth Circuit opinion, upholding an award of approximately \$20,000 to the Respondent Nathaniel Wells in this case to compensate Mr. Wells for economic injury suffered as a proximate result of willful racial discrimination, does not conflict with the decisions of the Fifth and Tenth Circuits cited by the petitioner at page 9 of its petition. The purported argument of the petitioner that the decision below by the Fourth Circuit does so conflict is frivolous.

Writing for a unanimous panel of the Fourth Circuit, Senior (formerly Chief) Judge Haynsworth considered the main case relied on below by the petitioner, Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975), and held that on the facts of the instant case, it is unnecessary to reach the constructive discharge issue. Judge Haynsworth said, "We think the back pay award was proper whether or not Wells was constructively

discharged." (Slip opinion, p. 5; Appendix A to petition, p. 17.) The Fourth Circuit's opinion below went on to note that: "Wells reasonably ended his employment for reasons beyond his control, reasons which were causally linked to the defendant's [petitioner's] wrongful denial of a promotion." (Slip opinion p. 6; Appendix A, p. 18; emphasis added.) The Fourth Circuit held that whether the issue was looked at as one of constructive discharge, or direct proximate causation of racial discrimination, the evidence adduced at trial, and the trial court's findings of fact, supported approximately \$20,000 in back pay to Mr. Wells following his leaving employment due to a back injury in September, 1975.

In all, Mr. Wells was awarded a total of \$22,256.80. Of this, approximately \$20,000 was what was awarded to Mr. Wells as back pay from the period after September 22, 1975, until time of judgment. The remaining amount, which is not in dispute in this Court, represents the pay differential between stock clerk or porter and sales

clerk between the time July, 1974, when Wells should have been promoted and September, 1975, when his back condition forced him to leave employment with the petitioner ABC Board. The district court also ordered Mr. Wells to be rehired in the next available cashier's position coming open with the petitioner ABC Board, and this relief was also affirmed by the Fourth Circuit. Mr. Wells in fact was rehired as a cashier and has been working in that position since October 1, 1983, when several cashier's positions came open with the Durham County ABC Board.

Even if this case is treated only as a constructive discharge situation, the Fourth Circuit's opinion does not conflict with the decisions from the Fifth and Tenth Circuits as argued by the petitioner. In the first place, the Fourth Circuit noted that petitioner ABC Board kept Wells in the position of stock clerk for over one year after he should have been promoted to sales clerk or cashier, with full knowledge from Wells and his physicians that it was inappropriate medically

for Mr. Wells to be required to remain in the stock clerk position due to the heavy lifting that position required. Thus the Fourth Circuit reasoned that Mr. Wells reasonably ended his employment as stock clerk and his duty of mitigation did not require that he continue in the job of stock clerk with its heavy lifting duties.

The fact situation in the instant case is far different than that in Muller, supra. In Muller, while the employer failed to promote an employee to a job of "spell foreman" and assigned him to a position which made it impossible for him to attain the position of "spell foreman," this was insufficient conduct by the employer to make things so difficult for the employee as to bring about his discharge or separation. Nevertheless, the Tenth Circuit correctly held that the doctrine of constructive discharge is applicable to civil rights cases; but the decision in Muller that there was not sufficient evidence of a constructive discharge of the plaintiff in that case turned upon the particular fact situation of that case.

Likewise, in Bourque v. Powell Electrical Manufacturing Co., 617 F.2d 61 (1980), the Fifth Circuit held the actions taken by the employer to be insufficient to constitute "working conditions so intolerable that the employee is forced into an involuntary resignation...." Baroque, supra, at 65, quoting Young v. Southwestern Savings & Loan Assn., 509 F.2d 140, 144 (5th Cir. 1975). The Fifth Circuit in Baroque continued its rule that the motive of the employer is not the test of whether there has been a constructive discharge, rather the focus must be upon the conditions imposed. Looking at the conditions imposed in Baroque, two of the circuit judges of the three-judge panel found the conditions insufficient to constitute a constructive discharge; the dissenting judge looking at the facts thought the actions taken in Baroque were conditions so intolerable as to amount to a constructive discharge, properly noting that whether a constructive discharge has occurred must be determined on a case-by-case basis. The actions that the majority found insufficient in Baroque

to equal a constructive discharge were the failure of the employer there to pay a woman equally with men in the same position, the making by the employer of discriminatory statements about promoting a woman to the job in question, and the imposing by the employer of a trial period not required of men promoted into the job.

Needless to say, the fact situation in Baroque is vastly different from the fact situation in the instant case, where Mr. Wells suffered from a back condition which his employers knew from the reports of his physicians would make it impossible for him to continue employment with the ABC system unless he was promoted to the lighter duties of sales clerk.

The district court, in finding a constructive discharge, specifically applied the Muller case in reaching its decision following the trial of this Title VII action (see Appendix B to the Petition for Certiorari, p. 55.) With respect to the award of back pay to Mr. Wells from the time the trial court found he was discriminatorily denied

a promotion from porter or stock clerk to sales clerk, including the time period after Mr. Wells' back condition forced him to leave employment with the ABC Board, Senior (formerly Chief) Judge Gordon of the United States District Court for the Middle District of North Carolina found the following facts:

(1) There are four job classifications in the ABC stores -- they include the stock clerk or porter's position requiring heavy lifting and strenuous physical work; and the sales clerk or cashier's job, which "is far less strenuous than that of the porter." (Appendix B, finding of fact no. 3, pp. 25-26; footnote omitted.)

(2) The job of porter (or technically stock clerk) is the lowest paying, most physically strenuous job in the ABC system. (Appendix B, finding of fact no. 4, p. 27.)

(3) From February 1, 1969, through September 1975, the petitioner ABC Board hired eleven whites directly into the higher position of sales clerk who had no prior experience with the ABC system,

instead of promoting qualified black persons, such as Mr. Wells, despite their grater experience working in the system. (Appendix B, finding of fact no. 8, p. 28.)

(4) At trial, ABC general manager Leathers testified that white persons were only interested in the higher paying sales clerk position, while blacks would "take anything". (Appendix B, finding of fact no. 11 p. 29.)

(5) The ABC Board, between the dates of February 1, 1969, and September 22, 1975, the period at issue in the litigation, engaged in a pattern and practice of racial discrimination against blacks with the result that all black persons hired by the ABC Board were hired at the lowest level of porter or stock clerk, while whites were directly employed, without prior experience, into the position of sales clerk, even where black employees who were qualified, experienced, and wanted to obtain promotions were available to promote. (Appendix B, finding of fact no. 13, p. 30.)

(6) In June, 1974, Respondent Wells asked

the general manager, Leathers, for a promotion to sales clerk. He did not get promoted, and on July 24, 1974, Mr. Wells filed a complaint with the Durham Human Relations Commission over this. On August 1, 1974, a white man, W.R. Porter, with no prior experience, was hired directly into a sales clerk position. (Appendix B, findings of fact no. 30-32, p. 35.)

(7) On September 4, 1974, Mr. Wells injured his back while lifting a case of whiskey. This injury was known to the general manager, Leathers. Wells asked to be promoted to a sales clerk or cashier's job, but the general manager, Leathers, refused the request for promotion and testified at trial that he could not allow someone with a bad back to operate a cash register. (Appendix B, finding of fact no. 34, p. 36.)

(8) In October, 1974, while refusing to promote Mr. Wells, Leathers did permit him to return to his more strenuous job duties of porter or stock clerk. (Appendix B, finding of fact no. 35, p. 36.)

(9) Mr. Wells was qualified to be a sales clerk when he applied for the position in June, 1974. (Appendix B, finding of fact no. 37, pp. 37-38.)

(10) Mr. Wells was denied promotion to the sales clerk position in August, 1974, because of his race. (Appendix B, finding of fact no. 38, p. 38.)

(11) In October of 1974, Wells and his co-plaintiff, Jerry Allen, who had also sought a promotion which was denied because he was black, filed complaints with the Equal Employment Opportunity Commission, and both the general manager Leathers and the members of the ABC Board had notice of these charges. (Appendix B, finding of fact no. 39, pp. 38-39.)

(12) In June, 1975, Mr. Wells reinjured his back on the job, and because of this injury missed 29 working days between June 12 and September 15, 1975. His treating physician at the Duke University Medical Center wrote a letter to general manager Leathers recommending that Mr. Wells be

employed in an area where he would not be required to do extensive heavy lifting. On September 18 and on September 22, 1975, another treating physician wrote general manager Leathers concerning the medical diagnosis of Mr. Wells' back condition, and stressed the importance of Mr. Wells' lifting no more than 10 to 15 pounds and not stooping or bending for prolonged periods. (Appendix B, findings of fact nos. 40-42, pp. 39-40.)

(13) On September 22, 1975, Mr. Wells had to cease work for the ABC Board because of his back condition. Mr. Wells did receive disability checks from the ABC's insurance provider for a period of two years, until the benefits ran out. (Appendix B, finding of fact no. 43, p. 40.)

(14) Mr. Wells left employment with the ABC Board as a result of his inability to do the heavy lifting required in the porter's or stock clerk's position because of the fact he was refused an opportunity to become a sales clerk. (Appendix B, finding of fact no. 44, p. 41.)

(15) On October 27, 1975, a white person with no prior experience was hired as a combination sales clerk/stock clerk, and one month later was promoted to fulltime sales clerk. (Appendix B, finding of fact no. 45, p. 41.)

(16) The ABC's general manager Leathers gave white employees with disabilities worse than Wells' back disability the opportunity to work as a sales clerk. One such white individual had a deformed hand and could not lift cases of whiskey at all. At second white man who had two spinal fusions to correct major back problems was also given the opportunity to work for the ABC system as a sales clerk. The ABC Board permitted certain employees, all white, to work in positions in the ABC stores to avoid heavy lifting. Mr. Wells was not allowed to avoid heavy lifting because he is black and because he challenged through the Durham Human Relations Commission and the EEOC the employment practices of the ABC Board. It was the refusal of the ABC Board to allow Mr. Wells a promotion to a job where he could avoid heavy lifting that forced him

to leave his employment with the ABC system in September, 1975. (Appendix B, findings of fact nos. 46-47, pp. 42-43.)

Upon the above findings of fact, the trial court then determined that Mr. Wells offered a prima facie case of racial discrimination in the refusal to promote him to the lighter duty work of sales clerk under the analysis by this Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and that the reason offered by the ABC Board in defense of its actions "was a pretext." (Appendix B, pp. 48-54, quoting from p. 54.)

Not only did the District Court below find racial discrimination against Mr. Wells due to the failure to promote him from a stock clerk to a sales clerk position, but the trial court also found as a fact that Mr. Wells was constructively discharged by the ABC Board under the Muller test, which the petitioner ABC Board contends is appropriate to apply. The trial court carefully analyzed the facts it found in light of the Muller decision, found that Mr. Wells had made out a

prima facie case for retaliation and constructive discharge, and rejected the ABC Board's arguments to the contrary. Judge Gordon in the trial court's memorandum opinion in this matter stated:

[I]t is concluded that the continued denial of promotion even after several letters from Wells' doctors to the ABC Board was, more likely than not, motivated by the fact that Wells had challenged the promotion policy of the ABC Board. In reaching this conclusion, the Court looks to the totality of the evidence. The defendant's arguments to the effect that Wells was not qualified and that there was no light duty in the ABC system offered in rebuttal have been considered and rejected....

(Appendix B, pp. 57-58; emphasis added.)

II. The Courts Below Properly Applied Section 706(g) of Title VII.

Because of the facts found by the trial judge, the remedy of back pay from the time Mr. Wells was forced to leave employment and apply for disability insurance benefits through time of trial -- decreased by income Mr. Wells received from insurance and new employment -- is consistent with the remedies required by Title VII of the

Civil Rights Act of 1964, and is not in contravention of Section 706(g). As the Fourth Circuit correctly found, whether this case is viewed as one in which the three refusals to promote Mr. Wells because of his race proximately caused his economic damage, or as one where the employer constructively discharged him in retaliation for his Human Relations and EEOC complaints, he is entitled to the damages awarded.

It is clear from the facts found by the trial court and emphasized, supra, that the ABC (1) refused to promote Mr. Wells in August, 1974, to a sales clerk job because of his race; (2) refused to promote again in September, 1974, after he injured his back in the strenuous stock clerk (porter's) job because of his race and Human Relations Commission complaint, and (3) refused again between June and September, 1975, to promote him because of his race and to retaliate for his EEOC complaint with knowledge that Mr. Wells' doctors said he should not lift even 15 pounds or do prolonged stooping and bending and with know-

ledge that the stock clerk's job required him to lift routinely 50-pound cases of whiskey.

Under those circumstances, Section 706(g) of the Act was not erroneously applied by the lower courts. As Petitioner ABC Board concedes, Title VII mandates broad remedial relief; yet here the relief was narrow and specifically tailored to make Mr. Wells whole despite the intentional racial discrimination and retaliation against him. The trial court carefully calculated his damages and gave the ABC Board credit for all mitigation deductions to which it was entitled.

Had Mr. Wells not injured his back, or had the injury not been sufficient to preclude his continuing in the stock clerk (porter's) job, it is beyond dispute that he would have been entitled to the difference between a sales clerk's higher salary and his stock clerk's salary up through the time of trial. Through no fault of Mr. Wells, he was forced eventually to leave his ABC Board employment in his lower-level job because of his back injury and because the ABC Board still re-

fused his requests to promote him to a job he could physically do and rightfully should have had by August, 1974, even before his back injury. What this means, as the Fourth Circuit found, is that the measure of damages after September 22, 1975, became the difference in what Mr. Wells would have earned in the sales clerk job and the 60% of the stock clerk's salary he was drawing from disability insurance. Even Petitioner does not dispute that the trial court was correct in awarding Mr. Wells the difference in salary in the two positions from August, 1974, through September 22, 1975.

If the case is viewed as one of retaliatory constructive discharge, as the District Court also concluded based on its findings of facts, clearly its award to Mr. Wells also was correct. Regardless of the theory used, the mathematical calculation comes out the same way. And, regardless of the theory used, the Congressional intent behind the passage of Title VII was upheld, not thwarted. It is wholly specious to argue, as does Petitioner, that the lower courts, and especially the Fourth

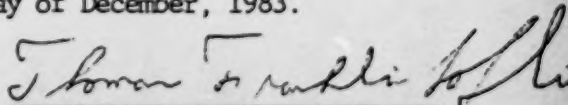
Circuit, acted in defiance of Section 706(g).

The overwhelming evidence at trial showed, and the Petitioner ABC in the Fourth Circuit conceded that the failures to promote Mr. Wells to the lighter duty sales clerk job was because of racial discrimination.

CONCLUSION

The issue in the present case is narrow and unique to the fact situation of this case, and no amount of rhetoric can convert it into one warranting review by this Court on certiorari. The facts found against the Petitioner by the trial court mandated the relief awarded to Mr. Wells, and the Fourth Circuit is clearly correct in upholding this relief. Therefore, the petition for certiorari should be denied.

This the 6th day of December, 1983.


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CERTIFICATE OF SERVICE

The undersigned attorney, Thomas Franklin Loflin III, a member of the Bar of the Supreme Court of the United States, and counsel of record for the Respondent herein, hereby certifies that on the 7th day of December, 1983, pursuant to Rule 28, of the United States Supreme Court Rules, he served three copies of the foregoing Respondent's Brief In Opposition to the Petition for Writ of Certiorari on each of the parties herein as follows:

On Petitioner Durham County Board of Alcoholic Control, by depositing said three copies in the United States post office located at Durham, North Carolina, with first-class postage prepaid, properly addressed to the post office address of Petitioner's counsel of record, William V. McPherson, Jr., Esquire, Post Office Box 2729, Durham, North Carolina 27705.

All parties required to be served have been served.

Dated December 7, 1983.

Thomas Franklin Loflin III

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